Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1977

No. 77-1003

JAMES V. NAPOLI, SR. and JAMES NAPOLI, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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No.

JAMES V. NAPOLI, SR. and JAMES NAPOLI, JR.,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, James V. Napoli, Sr. and James Napoli, Jr., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on October 13, 1977.

OPINIONS BELOW

The divided panel of the Court of Appeals filed three opinions. These unreported opinions, as well as the relevant portion of the unreported opinion of the United States District

Court for the Eastern District of New York, appear in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on October 13, 1977. On December 15, 1977 a timely petition for rehearing with suggestion for rehearing *in banc* was denied with two dissents. Copies of said orders are reproduced in the appendix. This petition for a writ of certiorari was filed within 30 days after denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether an order, issued pursuant to Title III[1], which specifically authorizes government agents to use electronic surveillance to seize words, but is silent as to their right to secretly trespass on private premises to install, move, maintain, recharge and remove the electronic listening devices, may, consonant with the Fourth Amendment, Title III and Rule 41, F. R. Crim. P., implicitly authorize government agents at will to make repeated secret trespasses for such purposes.

STATEMENT OF FACTS

The government, in conducting a gambling investigation aimed at petitioners Napoli, obtained eleven Title III orders pursuant to which FBI agents intercepted conversations for over 95 days.

Five orders (designated "309-I" through "309-V") were directed at an apartment believed to be a policy bank

1. "Title III" refers to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 *et seq.*

("Apartment 309"), under the control of petitioner Napoli, Sr. Based in large part on the evidence secured through the interceptions from Apartment 309, the government sought and obtained three more Title III orders (designated "HiWay I" through "HiWay III") aimed at the HiWay Lounge (the "HiWay"), a bar believed to be the headquarters of petitioners Napoli.

Not one of the Title III applications sought court permission for entry to install, move, maintain, or remove the listening devices. None of the applications specified the type of devices to be used or indicated that entry would be necessary to install them.[2] Not one of the applications established probable cause to believe that entry by stealth into these private premises would be required to install the devices the FBI contemplated using. Moreover, one could have inferred from the application for the HiWay I order that, if entry were necessary for installation, such entry would be made by an informant while on the premises.[3] Not one of the Title III orders authorized entry. Nevertheless, the government admitted to having made at least eight forced and surreptitious entries for such purposes.[4]

The government made at least three surreptitious entries into Apartment 309, first to install, later to move and finally to remove its devices.

2. There are, of course, electronic listening devices which can be employed without physical invasion of the target premises, *e.g.*, parabolic microphones and spike mikes.

3. Informers were referred to as being present at meetings in the HiWay in the application for the HiWay I order.

4. The government apparently kept no records of their break-in. It did not deny that there might have been more than eight such entries.

The government made at least five nighttime, surreptitious forced entries into the HiWay. During HiWay I it entered twice, first to install and later to move the devices. The devices were left in place after the expiration of HiWay I. Between the expiration of HiWay I and the government's application for HiWay II, the agents and special attorney discovered that the batteries on the devices had failed and the devices were inoperative. In anticipation of: (1) receiving permission of the Attorney General to apply for a second Title III order directed at the HiWay and (2) receiving such an order, the government made an informal oral and unrecorded application to a district judge for permission to enter to recharge the batteries. It is undisputed that this unrecorded oral application was not under oath, as required by the Fourth Amendment, Title III and Rule 41 of the Federal Rules of Criminal Procedure. It is likewise undisputed that without this entry, made pursuant to the informal order, to recharge the batteries, no evidence would have been seized during the later Title III order, *i.e.,* HiWay II. The government admits to at least two additional surreptitious forced entries into the HiWay, one during the pendency of HiWay II or HiWay III to again recharge the batteries and a second at the conclusion of HiWay III to remove the devices.

Timely motion was made to suppress the fruits of the foregoing electronic surveillance on the ground, *inter alia,* that these forced surreptitious entries violated petitioners' rights under the Fourth Amendment, Title III and Rule 41. The trial court denied suppression, holding:

> 1. Although both Title III and the instant orders were silent on the subject, a Title III order implicitly confers authority upon the government surreptitiously to enter, whenever it deems necessary, to install, move, maintain and remove the electronic surveillance devices; and

> 2. The informal entry order (between the expiration of HiWay I and before the issuance of HiWay II) was supported by probable cause.[5]

The Court of Appeals affirmed by a two to one decision with each judge writing his own opinion. The majority held that the issuance of a Title III order implicitly authorizes surreptitious forced entries at the government's sole discretion, to install, move, maintain and remove the electronic devices. In his concurring opinion, Circuit Judge Gurfein invited clarification by both Congress and this Court of the issue of the government's right to enter (Appendix, 20a-21a). He also stated that:

> ". . . until the Supreme Court speaks, it might be advisable for district judges to make a general direction for forcible or surreptitious entry a part of the interception order . . . ." (*Ibid.)*

The Court of Appeals never addressed the informal entry order, which allowed the government to recharge the batteries between the expiration of HiWay I and the issuance of HiWay II.

Circuit Judge Smith dissented stating, *inter alia*:

> "The course followed by the agents here makes a mockery of the promise that the 'dirty business' of electronic eavesdropping authorized by the Act . . . would be strictly supervised and controlled." (21a).

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5. There was no record support for the trial judge's findings of probable cause. Moreover, the district judge overlooked the fact that the government admitted that its informal application was not made under oath or affirmation or even recorded.

REASONS FOR GRANTING THE WRIT

I.

The decision below conflicts with recent decisions of other courts of appeals as to whether the issuance of a Title III order may constitutionally vest discretion solely by implication in government investigators to make surreptitious forced entries into private premises to install, move, maintain and remove the devices used to conduct the electronic eavesdropping.

The majority decision to the effect that the Title III order contains implicit authority to break and enter repeatedly, and at will, to install, move, maintain and remove the devices, squarely conflicts on constitutional grounds with the holdings of two other circuits, *Application of the United States,* 563 F.2d 637 (4th Cir. 1977); *United States v. Ford,* 553 F.2d 146 (D.C. Cir. 1977), and with the rationale of a third, *United States v. Agrusa,* 541 F.2d 690 (8th Cir. 1976), *cert. denied,* 429 U.S. 1045 (1977).

In *United States v. Ford, supra,* the District of Columbia Circuit in an unanimous opinion squarely held that the use of listening devices ("bugs"), which required physical entry into a protected premises

> "implicates two distinct aspects of the Fourth Amendment: unconsented physical entry into private premises and recording of oral statements." 553 F.2d at 152-53 (footnotes omitted).

The court then held:

> "We conclude, after analysis of the underlying policy considerations and well established precedents, that *surreptitious physical invasion of a* home or *protected business premises, when*

> *undertaken by police agents for the purpose of installing, maintaining or removing electronic eavesdropping devices, is, absent a valid consent or sufficiently particularized judicial authorization to enter, a violation of the Fourth Amendment.* Thus the surreptitious entry provision in the warrant here was not surplusage. It was a necessary precondition to the Government's unconsented entries into the Shoe Circus and the failure adequately to limit the authorization to enter was a fatal defect." 553 F.2d at 154-55 (footnotes omitted and emphasis added).

In sharp contrast to the instant case, the Title III order in *Ford* specifically authorized the government to

> "enter and re-enter . . . for the purpose of installing, maintaining and removing the electronic eavesdropping devices. Entry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry, or entry and re-entry by ruse and stratagem." 414 F. Supp. at 882; 553 F.2d at 149.

The district judge in *Ford* held that this order was so broad as to constitute an abdication by the issuing judge of his constitutionally mandated responsibility to give a neutral and detached scrutiny to the propriety of entry, in addition to the necessity for seizure of words. Because the warrant vested in the police "virtually unrestrained discretion in installing a surreptitious listening device" he held "the warrant invalid on its face." *Id.* at 884. In a detailed analysis, the court of appeals agreed. 553 F.2d at 154-55, 165-70.

In *Ford*, the government sought to overcome the invalid entry provision in the Title III order by offering to prove that the prosecutor and the government agents had actually conferred with the issuing judge concerning the manner and timing of each entry. The district judge, although expressing his view that the issuing judge had actually "held reins," 414 F. Supp. at 883, specifically rejected this showing as not comporting with the Fourth Amendment's mandate that the government establish probable cause by oath or affirmation, which showing must be recorded. *Id.* at 884-85. The court of appeals agreed, stating (553 F.2d at 169, fn. 64):

> "The discussions between the Assistant United States Attorney and the authorizing judge cannot be looked to in supplementing the probable cause showing of the affidavits since they were neither recorded nor statements of probable cause supported by oath or affirmation as required by the Fourth Amendment."

This holding in *Ford* plainly demonstrates the invalidity of the informal entry order, issued after HiWay I expired and before HiWay II was issued, which was upheld below without discussion. Pursuant to this informal order the FBI made a surreptitious, forced nighttime entry and recharged the batteries on their then-inoperative devices. It was only because of this unlawful entry that any evidence was obtained during HiWay II.

Shortly before the decision below was rendered, the Fourth Circuit unanimously filed an opinion in complete agreement on constitutional grounds with *Ford, supra,* and in square conflict with the decision below. *Application of the United States,* 563 F.2d 637 (1977). The Fourth Circuit held:

> "Secretive physical trespass upon private premises for the purpose of planting a bug entails an invasion of privacy of constitutional

> significance distinct from, though collateral to, that which attends the act of overhearing private conversations. While we have held that judicially-granted permission to invade an individual's expectation of conversational privacy, pursuant to Title III's guidelines, is constitutional, *United States v. Bobo,* . . . such permission does not suspend the operation of the Fourth Amendment for other purposes. It cannot, in itself, excuse even less grievous governmental incursions into other aspects of private life. As the Supreme Court observed in *Chimel v. California,* 395 U.S. 752, 767, fn. 12 . . . 'we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require.'
>
> Permission to surreptitiously enter private premises cannot, therefore, be implied from a valid Title III order sanctioning only the interception of oral communications. See *United States v. Ford, supra; United States v. Agrusa, supra* at 696. With respect to the instant case, this means that even had the district court issued an order of authorization on the basis of its preliminary conclusion that the statute permitted interception of the target conversations, the door would not have been automatically opened for the Government to plant listening devices in the manner proposed." 563 F.2d at 643-44 (footnotes and citations omitted).

The Fourth Circuit was there confronted with a refusal by a district judge to authorize electronic surveillance by surreptitious

forcible entry against gambling suspects, although the district judge specifically found that the government's application satisfied all of the prerequisites of Title III, and additionally showed that the only method of installing the devices in the suspects' business premises was by a surreptitious forcible entry. The district judge denied the order because of the entry request, which he held had to satisfy standards even more strict than those required to intercept oral communications. The Fourth Circuit held that the district judge "correctly bifurcated his considerations of the applications for permission to eavesdrop and to enter" (*Ibid.*), but that his test was impermissibly high as to the entry request, and accordingly, directed issuance of the order authorizing breaking and entry. The court further held:

> "The district court was thus correct insofar as it subjected the request for authorization of surreptitious entry to separate Fourth Amendment consideration. Since in the absence of exigent circumstances the Fourth Amendment commands compliance with the warrant requirement, we would normally countenance secret entry by federal agents for the purpose of installing, maintaining, or removing listening devices only under the following conditions: (1) where, as here, the district judge to whom the interception application is made is apprised of the planned entry; (2) the judge finds, as he did here, that the use of the device and the surreptitious entry incident to its installation and use provide the only effective means available to the Government to conduct its investigation; and (3) only where the judge specifically sanctions such an entry in a manner that does not offend the substantive commands of the Fourth Amendment." 563 F.2d at 643-44.

The decision below also conflicts with the rationale of *United States v. Agrusa*, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977), in which a divided panel denied suppression because (1) the Title III order specifically authorized physical entry *and* (2) the premises invaded were business premises, rather than a home.[6] The *Agrusa* majority refused to decide the more difficult question of whether suppression would be required if both of these factors were not present. *Id.* at 696, fn. 13. The panel's dissenter was of the view that such searches were unreasonable *per se*. *Id.* at 702-04. He was later joined by three of his brothers, who dissented from denial of rehearing *in banc*, thus effectively denying suppression by an equally divided court in the face of a Title III order, which specifically authorized entry. The dissent of half of the Eighth Circuit stated:

> "We entertain great doubt of the validity of a judicial order which authorizes such a break-in. We tend to agree with the views of Judge Lay expressed in dissent to the panel opinion [in which he stated such searches were unreasonable per se and their fruits should be suppressed. *Id.* at 702-04]. . . ." *Id.* at 704.

The foregoing establishes that there is a direct conflict on constitutional grounds between the majority decision below and the holdings of the District of Columbia Circuit and the Fourth Circuit, and the rationale of the Eighth Circuit as to whether permission to surreptitiously enter private premises can, consistent with the Fourth Amendment, Title III and Rule 41, F. R. Crim. P., be implied from a valid Title III order which merely authorizes the interception of oral communications.

---

6. After the *Agrusa* decision was rendered, this Court decided *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352-54 (1977), which effectively undercut the Eight Circuit's reliance upon the fact that the invaded premises was a business establishment. Moreover, the premises in *Ford* and *Application of the United States* were also business premises.

II.

The conflict among the circuits caused by the decision below raises important and recurring problems concerning the scope of the Fourth Amendment and the administration of Title III which this Court should resolve.

Although Title III covers all electronic surveillance permitted to be used by the government, Congress did not prescribe any standards for the Judicial Branch to apply in authorizing the use of those listening devices which would require secret trespasses to install, maintain, move and remove. The conflict among the circuits created by the split decision below has created further uncertainty in the issuance and implementation of Title III orders and their relationship to the Fourth Amendment and Rule 41, F. R. Crim. P. Judge Gurfein's concurring opinion specifically notes the need for Supreme Court guidance pending suggested congressional clarification.

Significantly, the government has characterized the issue raised herein as being "of the utmost importance to the administration of Title III" (Government's motion for an extension of time to file its brief in the Second Circuit, p. 2). And as did the court below, the government recognized that the result for which it contended was in irreconcilable conflict with the holding of *Ford* on this issue. (Government's Brief below, fn. 13, pp. 29-30).

The importance of this constitutional issue, as recognized by the government itself, together with the frequency with which it is being raised, require a resolution by this Court, as invited by Judge Gurfein in his concurring opinion below.[7]

7. The issue at bar is now *sub judice* before both the Third Circuit in *United States v. Dalia*, 426 F. Supp. 862, 863-66 (D.N.J. 1977) and the Sixth Circuit in *United States v. Finazzo*, 429 F. Supp. 803 (E.D. Mich. 1977) (Keith, Ch. J.) on conflicting district court decisions.

One should not be imprisoned by a New York federal court on evidence which could not constitutionally be admitted in a federal court in Washington or Baltimore. The Fourth Amendment, Title III and Rule 41 should have the same meaning throughout our country.

III.

The decision below failed to correctly apply prior decisions of this Court.

The implication of authority to make repeated entries onto private property to install, move, maintain and remove electronic listening devices to conduct court authorized oral interception of voices fails to correctly apply decisions of this Court.

Berger v. New York, 388 U.S. 41 (1967) struck down New York's eavesdropping statute as constitutionally overbroad. In *Berger* there was a court authorized electronic surveillance with a bug being planted in an attorney's office. A few months later, in *Katz v. United States*, 389 U.S. 347 (1967), this Court overruled its decisions requiring a trespass to trigger Fourth Amendment protection from electronic surveillance and directed suppression of non-trespassory electronic surveillance, because there was no antecedent judicial approval. Both decisions indicated that a statute could be crafted to permit electronic surveillance. Title III was enacted in an attempt to comply with *Berger* and *Katz*.

Neither *Berger* nor *Katz* specifically addressed the question of whether entry could or should be expressly authorized, much less implied, for secret trespass in aid of authorized listening. However, both cases cited with approval the procedure which was followed in *Osborn v. United States*, 385 U.S. 323 (1966). In *Osborn* two judges authorized the use of a body recorder based upon a sworn detailed showing of probable

cause. *Berger* placed great reliance upon the "safeguards" established in *Osborn. Berger, supra,* 388 U.S. at 57:

> "the order authorized one limited intrusion rather than a series or a continuous surveillance. And, we note that a new order was issued when the officer sought to resume the search and probable cause was shown for the succeeding one."

Reviewing *Berger's* analysis of *Osborn, Katz* noted (389 U.S. at 355 footnote omitted):

> "Through those protections, 'no greater invasion of privacy was permitted than was necessary under the circumstances.' *Id.* at 57."

The standard expressed in *Katz* for electronic surveillance is as follows (389 U.S. at 354):

> "Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and *clearly apprised of the precise intrusion it would entail,* could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place." (Emphasis added.)

The decision below eliminates the antecedent judicial supervision required by *Katz.* It would, by implication, vest complete discretion in FBI agents repeatedly to enter private premises to install, move, maintain and remove the electronic devices they have chosen to use to conduct the court authorized electronic spying. This result misconstrues and misapplies the

clear direction of this Court in *Osborn, Berger* and *Katz.* It is the issuing judge's obligation to assure himself in advance that the intrusion into both conversational privacy and private property will be kept to a bare and essential minimum. Giving the police unfettered authority repeatedly to enter, whether by express general entry provision in a Title III order or by implication from the mere issuance of a Title III order, clearly violates the constitutional teachings of this Court.

The decision below necessarily concludes that *Katz,* which expressly broadened our Fourth Amendment right to be free from non-trespassory invasions of our conversational privacy, *sub silentio* narrowed our ancient right to be free from unauthorized invasions of our private property. This erroneous conclusion of the court below overlooks post-*Katz* decisions of this Court and relevant analyses of other circuits.

For example, in *Alderman v. United States,* 394 U.S. 165, 180 (1969) this Court stated:

> "Nor do we believe that Katz, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home or to overrule the existing doctrine, recognized at least since Silverman, that conversations as well as property are excludable from the criminal trial when they are found to be the fruits of an illegal invasion of the home."

And in *United States v. United States District Court for the Eastern District of Michigan,* 407 U.S. 297, 313 (1972) this Court stated "physical entry of the home is the chief evil against which the Fourth Amendment is directed . . . ."

Although the Ninth Circuit has not ruled on the precise issue at bar, its decision in *United States v. Hufford,* 539 F.2d 32 (9th Cir. 1976) evidences clear agreement with the results later reached in *Ford, supra, and Application of the United States, supra.* In *Hufford* the government placed one "beeper" to permit tracking in a drum of contraband and a second beeper in the defendant's truck. A warrant was obtained to allow the agents to enter defendant's garage and install the beeper under the truck's hood. When the beeper in the truck failed, a second warrant was obtained and a second beeper installed. The Ninth Circuit upheld the conviction because of the warrants. No warrant was necessary to plant the beeper in the contraband since it was then in possession of the chemical company which sold it to defendant. The recent decision of the First Circuit in *United States v. Moore,* 562 F.2d 106 (1st Cir. 1977) is also in accord. As in *Hufford* two beepers were used. One was attached to a vehicle and the other placed in a box of non-contraband chemicals before it was delivered to defendant. The beeper attached to the vehicle was approved, although attached without a warrant, because the agents had probable cause and because the intrusion was minimal. In contrast, the beeper placed, without warrant, in the box of non-contraband chemicals, was held to be violative of the Fourth Amendment with the court explaining (562 F.2d at 113):

> "When defendants withdrew from the public view, taking the box of chemicals inside with them, they had every right to expect that their activities inside the house which they sought to preserve as private would be free from warrantless intrusion by the Government. Doubtless the limited data transmitted by a beeper was far less revealing than the conversation recorded in *Katz;* the level of intrusion was less severe. Still, as the chemicals containing the transmitter were not contraband or otherwise wrongfully in appellees' possession,

> the Government had no right to determine their continued presence in the house by use of warrantless electronic surveillance."

It is thus clear that implication of authority to enter is contrary to this Court's existing decisions and interpretations of those decisions by other circuits.

IV.

The decision below raises an important question of first impression regarding the correct statutory interpretation of Title III.

Title III is Congress' comprehensive legislation respecting electronic surveillance. Neither that statute nor its legislative history deals with the question of whether the courts are authorized to permit physical invasion to install, move, maintain or remove electronic listening devices. While such judicial authority may exist with proper and express antecedent judicial supervision under Rule 41, F. R. Crim. P., and the All Writs Act, 28 U.S.C. §1651, there is serious doubt that such assumed authority should be exercised in the face of congressional silence.

The question has not seen agreement in the circuits. Both the court below and the Fourth Circuit in *Application of the United States, supra,* held that authority could be granted. In *Ford,* 553 F.2d at 170, the District of Columbia Circuit specifically left the question undecided. This issue caused an even split in the Eighth Circuit, with Judge Lay expressing the view, later joined in by three of his brothers, that such searches were unreasonable *per se. Agrusa,* 541 F.2d at 702-04.

Although the resolution of this issue is not essential to a resolution of this case, the matter has caused sufficient confusion so as to draw from Judge Gurfein, in his concurring opinion

below, the suggestion that a general entry provision be incorporated in all Title III orders, at least until this Court speaks.

Moreover, this case presents an opportunity for this Court to give general guidance in other matters relating to electronic surveillance as to which Title III is silent. Such guidance may go far in assuring that the fruits of these costly investigations will not be lost, either by oversight or the government's misinterpretation of its obligations.[8] It will avoid much time-consuming litigation.

V.

The Second Circuit's implications regarding standing are in direct conflict with Title III, the Supreme Court's prior decisions and the decision of another circuit court of appeals.

Although the Second Circuit said that, "for the purposes of this appeal, we need not decide whether or not standing exists", their prior discussion of standing made clear, that only those defendants who had an interest in the premises at the time of the entry, could raise the surreptitious entry issue. Both courts below held, and the government conceded, that Napoli, Sr. had a sufficient possessory interest in the HiWay to confer standing upon him.

The requirement that one have an interest in the property invaded to confer standing is in direct conflict with this Court's decision in *Alderman v. United States,* 394 U.S. 165 (1969); *Brown v. United States,* 411 U.S. 223 (1973) and the District of Columbia's decision in *United States v. Ford,* 553 F.2d at 175 n. 79 and 18 U.S.C. §2518(10) and §2510, which would grant

8. The government has in non-record discussions indicated that the non-inclusion of an entry provision was a conscious decision as a part of its Title III policy.

standing to all defendants whose conversations were seized as a result of the alleged illegal entry.

CONCLUSION

For these reasons, a writ of certiorari should be issued.

Respectfully submitted,

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January 13, 1978

APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED OCTOBER 13, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 909, 910, 911, 912,
913, 914, 915, 916, 917—September Term, 1976.

(Argued May 16, 1977 Decided October 13, 1977.)

Docket No. 76-1495

UNITED STATES OF AMERICA,

Appellee,

—against—

EUGENE SCAFIDI, BARIO MASCITTI, ANTHONY DIMATTEO, SAVERIO CARRARA, MICHAEL DELUCA, JAMES NAPOLI, JR., JAMES V. NAPOLI, SR., ROBERT VOULO and SABATO VIGORITO,

Appellants.

Before:

MOORE, SMITH and GURFEIN,

Circuit Judges.

Appeal from judgments entered in the United States District Court for the Eastern District of New York before Honorable Jacob Mishler, *Chief Judge,* convicting appellants of conducting illegal gambling businesses in violation of 18 U.S.C. §1955.

All convictions affirmed.

FRED F. BARLOW, Special Attorney, Department of Justice, Brooklyn, New York; and

Decision of the United States Court of Appeals

MICHAEL E. MOORE, Attorney, Department of Justice, Washington, D.C. (David G. Trager, United States Attorney for the Eastern District of New York; William G. Otis, Attorney, Department of Justice, of counsel), *for Appellee.*

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Decision of the United States Court of Appeals

MOORE, *Circuit Judge:*

Nine defendants, Eugene Scafidi, Robert Voulo, James Napoli, Sr., James Napoli, Jr., Michael DeLuca, Sabato Vigorito, Saverio Carrara, Bario Mascitti, and Anthony DiMatteo appeal their convictions, after a jury trial before Chief Judge Mishler in the Eastern District of New York, for operating illegal gambling businesses in violation of 18 U.S.C. §1955.

The counts upon which the various defendants were convicted related to operations at different times and places. More specifically, twenty defendants were tried together on four counts of a seven-count indictment. Scafidi and Voulo were convicted on Count Two (the "967 East Second Street Count") of conducting an illegal gambling business from March, 1972 to July 1972. Appellants Napoli, Sr., Napoli, Jr., DeLuca, Vigorito, Carrara, Mascitti, and Di Matteo were convicted on Count Four (the "Hiway Lounge Count") of conducting an illegal gambling business from April, 1973 to June, 1973. Count Three (the "Apartment 309 Count") was dismissed after trial because the jury did not find five people involved in that gambling business, as required by §1955. Count Seven, the conspiracy count, was dismissed at the close of the Government's case because the indictment alleged a single conspiracy but the evidence showed at least two. Sentences for the defendants ranged from five years in prison and a $20,000 fine (Napoli, Sr.) to two months in prison and 34 months probation (Scafidi).

I.

The evidence at trial showed a large-scale numbers lottery operating in Brooklyn during three discrete time periods: Spring, 1972 (the 967 East Second Street Count); Winter, 1972-73 (the Apartment 309 Count); and Spring, 1973 (the Hiway Lounge Count).

The 967 East Second Street Count: Scafidi and Voulo.

On May 1, 1972, FBI agents conducted a warrant-authorized search of a residence at the above address. They discovered Voulo and two others in the basement operating a policy "bank". They seized a great deal of betting paraphernalia, some of which contained Voulo's fingerprints.

Visual surveillance prior to the search had established that Voulo, Scafidi and others had been using the residence for more than one month. Apparently, Scafidi regularly picked up daily policy "ribbons" for delivery to the ring's "controllers" around the city.

Also, a warrant-authorized search of 405 Elder Lane in Brooklyn in June, 1971, had found Scafidi and Voulo standing at a table piled high with betting slips, adding machines and cash.

The Apartment 309 Count: DiMatteo, Mascitti, Scafidi, Voulo, and Rocco Riccardi (all charged, but count dismissed after guilty verdicts were rendered only against the first four).

The evidence on this count consisted primarily of tape recordings made pursuant to court-ordered electronic equipment (referred to herein as "bugs") placed at the apartment of a friend of Mascitti. The friend allowed Mascitti to use the apartment for a few hours each afternoon while she was absent. DiMatteo and Mascitti were shown to be "bank" workers who called Scafidi about gambling at least once each day. A court-ordered wiretap of Scafidi's home phone showed that he operated a lottery "accounting office". Because one defendant, Riccardi, was acquitted on this count, the Government failed to show the involvement of five people in the operation, as necessary under §1955. The count was thus dismissed.

Three court orders had authorized the bugs at Apartment 309: Orders 309-I, 309-II, and 309-III. 309-I was issued by Judge Orrin G. Judd on December 8, 1972, and authorized interceptions for 15 days. 309-II was issued by Judge Jack B. Weinstein on January 15, 1973, permitting interceptions for 15 days. 309-III was issued by Judge George Rosling on February 20, 1973, approving interceptions for 15 days at Apartment 309 and at Scafidi's residence in Queens. All the orders listed some of the defendants by name and included "others as yet unknown" as targets. The bugs at Apartment 309 were installed on the night of December 8, 1972, after the building superintendent gave the agents a key to gain entry. The agents re-entered the apartment once more during the surveillance to reposition one bug.

Because the Apartment 309 Count was ultimately dismissed, any investigatory errors of the police are relevant on appeal only to the extent that the evidence presented for this Count might have "spilled over" to affect other counts.

The Hiway Lounge Count: The Napolis, DeLuca, Vigorito, Carrara, Mascitti, and DiMatteo.

This was the principal count. Court-ordered bugs revealed that the Lounge was the headquarters for a massive numbers game. James Napoli, Sr. was the leader, with Napoli, Jr., Carrara, and Vigorito working as "controllers". DeLuca worked as an "accountant", and Mascitti and Di Matteo were "bankers".

The bugs at the Lounge had been installed pursuant to three court orders: Orders Hiway-I, Hiway-II and Hiway-III. Hiway-I was issued by Judge John R. Bartels on April 12, 1973, authorizing interceptions for 15 days excluding Sundays. The named targets were the Napolis,

DiMatteo, DeLuca, Martin Cassella and Richard Bascetta. Hiway-II was issued by Judge Bartels on May 3, 1973, *i.e.*, three days after the end of Hiway-I, authorizing the bugs for 15 more days, excluding Sundays. The targets named were the Napolis, DeLuca, Voulo, several non-appellants, and "others as yet unknown". Hiway-III was issued on May 24, 1973, *i.e.*, three days after the end of Hiway-II. The tapes obtained by Hiway-III were not sealed until more than three months later. No evidence from Hiway-III was introduced at trial.

The listening devices used in the Lounge were placed by FBI agents on the night of April 12-13, 1973. They were originally placed with one at the bar and one in a back room. During the pendency of Hiway-I the agents re-entered the Lounge to move the bar bug into the back room. During the three-day "pause" between Hiway-I and Hiway-II, Judge Judd issued an order authorizing the agents to enter the Lounge on the night of May 2-3 to restore the batteries in the bugs. At some point during Hiway-II and Hiway-III the agents re-entered to restore the batteries once again.

II.

The appellants raise many points of alleged error and each adopts the points argued by the others.

Besides the question of standing, namely, the right to question the legality of the surreptitious entries by agents to place the electronic devices which recorded the appellants' conversations, appellants' arguments focus primarily on various claims that the warrants pursuant to which the agents acted were for numerous reasons illegal and violative of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 *et seq.*

At the close of the Government's case, the conspiracy count was dismissed as to all appellants because of the discrepancy between the single conspiracy alleged in the indictment and the evidence of multiple conspiracies shown at trial. The Court's dismissal of the conspiracy count gives rise to appellant's claim that reversible error resulted from the Court's refusal to grant a mistrial or to sever the trial as to the individual defendants. Their claim is that the spill-over effect of the evidence admitted pursuant to the conspiracy count was highly prejudicial and probably responsible for the respective convictions.

Whether appellants have standing to object to the surreptitious entries of Apartment 309 and the Hiway Lounge.

Appellants argue that the evidence derived from the bugs planted in Apartment 309 and the Hiway Lounge should be suppressed because of allegedly improper surreptitious entries made by the agents to place and recharge the bugging devices. The Government contends that none of the appellants has standing to question the entries into Apartment 309, and that only Napoli, Sr. has standing to object to the entries into the Lounge.

All of the appellants were in some way overheard on the bugs planted in Apartment 309 and/or the Lounge. Thus, they all claim that they have standing to object to any unauthorized entries because they are "aggrieved persons" within the meaning of 18 U.S.C. §2510(11). But that statute simply confers standing to object to unauthorized electronic surveillance; it does not expressly encompass standing to object to allegedly unauthorized entries to place or recharge the bugs. Only one present at the seizure or with a recognized "interest", either possessory or proprietary, in the premises, can claim the required "expectation of privacy" needed to object to such illegal entries. *See Alderman* v. *United States,* 394 U.S. 165 (1969) (proprietor can object to any unauthorized wiretap; those over-

heard can object only to their voice being overheard); and *Brown* v. *United States,* 411 U.S. 223 (1973) (those with no interest in storehouse cannot object to illegal search which uncovered stolen merchandise).

The elder Napoli was the manager of the Hiway Lounge, and as such can raise any issue of unauthorized entry. But none of the other appellants had any interest in the Lounge except for their presence there for a few hours each afternoon. Mascitti has an arguable claim to a proprietary interest in Apartment 309 because the true lessee, his friend, lent him the apartment's key so that he could enter on his own. But the district court found that his possession of the key and use of the premises for such a limited purpose was not enough to give him standing.

Whatever the exact, technical interests, or lack thereof, which these appellants had in the premises entered by the agents, it seems artificial to say that a person overheard, whose conversation would not have been overheard but for the entry, has no standing to move to suppress the conversations on a claim that the entry was improper. In any event, whether standing is accorded in this appeal to only one or any number of the appellants will not affect our holding that the Orders and the agents' activities were entirely proper. Therefore, for purposes of this appeal, we need not decide whether or not standing exists for the defendants to raise the claim of allegedly illegal entry.

Whether a court order authorizing illegal entry for secret placement, repair and/or removal of bugs is required as a part of, or in addition to, the court order authorizing the use of bugs.

Mascitti and his co-appellants claim that Title III of the Omnibus Crime Control Bill of 1968, 18 U.S.C. §2510 *et seq.,* prohibits all surreptitious police entries to install,

repair or remove court-authorized bugs. However, it is clear from the legislative history of the Bill as well as the language of the statute, that Congress intended to empower courts to permit such entries in proper cases and under proper procedures. *See United States* v. *Ford,* 414 F.Supp. 879, 883 (D. D.C. 1976), *aff'd* 553 F.2d 146 (D.C. Cir. 1977); S.Rep. No. 1097, 90th Cong., 2d Sess. 67, 103 (1968).

There remains the question of whether the authority granted by Title III is properly implemented where the court which approves the use of bugs does not explicitly authorize, either in the authorization order or in a separate order, secret break-ins to place, repair and/or remove the bugs. The Government argues that permission to make secret entries is at least implied in the bug authorizations here. Appellants argue, however, that all evidence gathered must be suppressed unless the court specifically authorizes secret entries.

The courts appear to be split on this issue, particularly after the recent District of Columbia Court of Appeals decision wherein it was held that the legislative purpose of Title III requires a separate court order for entry, *United States* v. *Ford,* 553 F.2d 146 (D.C. Cir. 1977). *See United States* v. *Altese,* No. 75 Cr. 341 (E.D.N.Y., Oct. 14, 1976) (separate order *not* required); *United States* v. *Dalia,* 426 F.Supp. 862, 865-66 (D.N.J. 1977) (separate order *not* required); *United States* v. *Finazzo,* 429 F.Supp. 803, 806-8 (E.D.Mich. 1977) (separate order required). It must be noted that until the District of Columbia Circuit spoke on this issue, it was generally considered proper practice *not* to require a separate warrant for entry.

The orders in our case, after a recital of facts charging that various appellants "have committed and are committing offenses involving the conducting, financing, managing, supervising, directing or owning in whole or in part

a gambling business" in violation of State and Federal law, authorized the agents to intercept oral communications of the appellants specified therein at the named premises. The orders further provided that

> "this authorization to intercept oral communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of conversations not otherwise subject to interception. . . ." App. at A238, A276.

There can be no doubt that the warrants were based upon adequate factual affidavits. The alleged defect in the warrant is not the underlying factual basis therefor, but its lack of specific "breaking-in" authorization and a statement of the manner in which such "breaking-in" was to be conducted.

But the most reasonable interpretation of the orders in this case, granting authorization to bug private premises, is that they implied approval for secret entry. Indeed, any order approving electronic surveillance of conversations to be overheard at a particular private place, must, to be effective, carry its own authority to make such reasonable entry as may be necessary to effect the "seizure" of the conversations.

As Chief Judge Mishler stated below in his Memorandum Decision dated October 14, 1976,

> "[I]t is this Court's position that once probable cause is shown to support the issuance of a court order authorizing electronic surveillance thereby sanctioning the serious intrusion caused by interception, there is implicit in the court's order, concomitant authorization for agents to covertly enter the premises and install the necessary equipment." App. at A133.

Once a judicial officer is convinced by the facts presented to him that electronic surveillance will aid in the detection of crime, his authorization that it be used should then transfer to the appropriate police agency the decision as to the precise mechanical means whereby the order is to be carried out. If the instrumentality to be used is a "bug", the placing of such a bug must of necessity be in the hands of the persons so authorized. And such placing will have to be surreptitious, for no self-respecting police officer would openly seek permission from the person to be surveilled to install a "bug" to intercept his conversations.

It would be highly naive to impute to a district judge a belief that the device required to effect his bugging authorization did not require installation. But neither should judges be presumed to have such familiarity with the installation of such devices or the premises in which they are to be installed that a court should be required in its order to specify the method of entry, the appropriate location of the bug, and the steps to insure its proper functioning. Were this to be required, a judge, in consultation with law enforcement officers, might have to visit the premises to be entered and discuss the best (or least objectionable) method of entry and the areas for the installations. His order would then have to contain explicit directions as to how to proceed, with the risk that any deviation therefrom, created by unforeseen emergencies, would create a possibility of illegality. It would be most unseemly for the courts to invade the province of law enforcement agencies by assuming that their competence was greater than that of the agencies presumably skilled in their field. It is significant that the statute, generally so detailed in its supervisory requirements, makes no mention of any need for a separate entry order. That the statute requires general supervision by the courts over

the bugging operation does not even impliedly impose on them the practical enforcement steps.

We, therefore, hold that when an order has been made upon adequate proof as to probable cause for the installation of a device in particular premises, a separate order authorizing entry for installation purposes is not required.

Nor do the subsequent entries for repair or battery recharging alter this result. These were not entries for any purpose other than that originally authorized. No greater incursion into the appellants' privacy occurred from the re-entries than resulted from the original entries. Furthermore, there is no suggestion that in any of the entries the FBI agents seized or attempted to seize or inspect papers or other articles not embraced in the order. They adhered to the authorized single purpose of seizing conversations represented in the papers on which the orders were granted as being of a criminal nature.

Whether the Government violated various provisions of Title III.

Mascitti contends that the affidavits underlying Order 309-I did not sufficiently demonstrate the need to bug the particular apartment. This claim is groundless. Physical surveillance of Apartment 309 had detailed the regular goings and comings of DiMatteo and Mascitti, and analysis of the apartment's trash had revealed betting slips and records.

Napoli, Sr. presents a similar insufficiency contention regarding the affidavit for interceptions at the Hiway Lounge. But the affidavit presented information gleaned from the bug of Apartment 309 as well as information gotten from confidential informants with established records of credibility. Also, physical surveillance identified the comings and goings of the principal suspects. The 25-

page affidavit of Special Agent Parsons reveals more than sufficient information to justify the issuance of the Hiway-I warrant. App. at A277-A302.

DiMatteo argues that the affidavit underlying the bugs at Apartment 309 did not sufficiently demonstrate what other investigative procedures had been tried without success. *See* 18 U.S.C. §2518(1)(c). But the affidavit adequately informs the judge of the "nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods", which is precisely what it has to do to satisfy the statute. *United States* v. *Hinton,* 543 F.2d 1002, 1011 (2d Cir. 1976), *cert. denied,* 97 S.Ct. 493, 796 (1977); *United States* v. *Fury,* 554 F.2d 522, 530 (2d Cir. 1977).

Mascitti, DiMatteo and Vigorito argue that the "delays" in sealing the tapes of conversations after the expiration of their authorizing orders require suppression of the tapes.

In *United States* v. *Fury, supra,* 554 F.2d at 532-33, we held that, where a single order was extended, the tapes did not have to be sealed until the end of the last extension. Where the intercept is of the same premises and involves substantially the same persons, an extension under these circumstances requires sealing only at the conclusion of the whole surveillance. *United States* v. *Principie,* 531 F.2d 1132, 1142 n.14 (2d Cir. 1976), *cert. denied,* 97 S.Ct. 1173 (1977). The foregoing applies to the short delays in sealing 309-I and 309-II as well as Hiway-I and Hiway-II, for once the later Orders are deemed extensions of the prior ones, the administrative delay in sealing—in only one instance more than seven days—is reasonable and fully understandable. Even if the later Orders are deemed separate events, the sealing delays are quite distinguishable from those in the case relied upon by the appellants, *United*

States v. *Gigante,* 538 F.2d 502 (2d Cir. 1976), where the unexcused delay was for over eight months.

The only tapes that were not sealed during the pendency of a subsequent extension order were those made pursuant to Order 309-III. These tapes were sealed after a delay of seven days caused primarily by the preoccupation of Special Attorney Barlow with preparations for the upcoming trial. Testimony presented to the trial judge made clear that the delay was not the result of any intent to evade statutory sealing requirements or to gain any tactical advantage. We agree with the trial judge that the Government has presented a satisfactory explanation for this short delay, fully in accord with the requirements of 18 U.S.C. §2518(8)(a). *United States* v. *Fury, supra,* 554 F.2d at 533.

Vigorito argues that the Government continued the Hiway-I and -II bugs beyond their 15-day expiration dates. But the authorizations for the bugs expressly excluded counting Sundays, so that all of the overheard conversations were within the authorized time periods.

Mascitti contends that the Government's failure to timely file "progress reports" to the authorizing judges requires suppression of the tapes gotten from the bugs. In several instances involving the 309 Orders, progress reports were filed up to two weeks late or not at all; with the Hiway Orders, one report was filed two days late. While these reports should have been timely filed, the sanction for failure to do so is surely not automatic suppression of the tapes. The requirement of reports, designed to enable the district judge to evaluate the continuing need for surveillance, is in the first instance discretionary with the judge authorizing the bugs. *See United States* v. *Iannelli,* 477 F.2d 999, 1002 (3rd Cir. 1973), *aff'd* 420 U.S. 770 (1975). So, surely, are any sanctions for failure to file timely. *See*

18 U.S.C. §2518(6). The judges here clearly did not abuse their discretion.

Carrara argues that the Government's failure to name him in the Hiway-II order requires suppression of his conversations gathered by that order. This argument is entirely refuted by *United States* v. *Donovan,* 429 U.S. 413 (1977). Napoli, Sr.'s similar claim is also refuted by *Donovan.*

DiMatteo argues that the misidentification of him as "Pasquale Rossetti" in Order 309-I requires suppression. This argument is frivolous in light of the complete absence of evidence that the Government was not acting in good faith. And the argument of DiMatteo based on failure to serve a timely inventory notice is foreclosed by *United States* v. *Donovan, supra. See also United States* v. *Variano,* 550 F.2d 1330, 1335-36 (2d Cir. 1977).

Whether there was sufficient evidence to convict Scafidi and Carrara.

Only Scafidi and Carrara question the sufficiency of the evidence against them.

Scafidi was observed regularly using 967 East Second Street. In fact, he arrived at the apartment once while the police were searching it. Prior to and subsequent to the use of the apartment, Scafidi had been involved with policy rings which used the same type of wagering records and the same runner identifications. Also, Scafidi's phone calls from his home, properly intercepted by wiretaps, convincingly proved his involvement with the venture.

Carrara was taped while in several incriminating conversations with Napoli, Sr. which strongly support the inference that Carrara was actively involved in the ring as one of its "controllers". The jury properly convicted him on this basis.

Whether Count Four of the indictment (the Hiway Lounge Count) was legally sufficient.

Napoli, Sr. contends that the Hiway Lounge count of the indictment was fatally defective for not specifying the type of gambling business he was alleged to have conducted. This argument holds no merit. The indictment tracked §1955 while specifying approximate dates and relevant New York statutes. This is sufficient under *United States* v. *Salazar,* 485 F.2d 1272, 1277 (2d Cir. 1973), *cert. denied,* 415 U.S. 985 (1974).

Whether appellants were prejudiced by "spill over" from their joint trial.

Most of the appellants (Napoli, Jr., Mascitti, Vigorito, Voulo, DeLuca, and Carrara) argue that once the trial court dismissed the conspiracy count at the end of the Government's case, the remaining substantive counts should have been severed for separate trials. The settled rule is that such a severance is not required unless prejudice would otherwise result or unless the conspiracy count had not been alleged in good faith. *United States* v. *Ong,* 541 F.2d 331, 337 (2d Cir. 1976), *cert. denied,* 429 U.S. 1075 (1977). There is no evidence here of bad faith on the part of the Government, and the conspiracy count was not frivolous; it was dismissed only for variance. The trial court gave the jury a lengthy cautionary instruction to disregard the conspiracy evidence and to judge each defendant on his own words and deeds. The jury showed its understanding of the instruction by acquitting several defendants. Moreover, the defendants convicted were found guilty on strong evidence, greatly reducing any risk of prejudice from joinder.

We have carefully considered all of the numerous issues raised by the appellants and find them to be without merit. The convictions are affirmed.

GURFEIN, *Circuit Judge,* concurring:

The dissenting opinion of my respected brother, J. Joseph Smith, and the split in the circuits, *see United States* v. *Ford,* 553 F.2d 146 (D.C. Cir. 1977), and *compare United States* v. *Agrusa,* 541 F.2d 690 (8th Cir. 1976), impels me to add some of my own reasons for concurring in the majority opinion. Congress has constructed a statutory scheme for meeting the problems raised in *Berger* v. *New York,* 388 U.S. 41 (1967), and *Katz* v. *United States,* 389 U.S. 347 (1967), by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* The issue is narrow. When a federal agent obtains access by trespass to premises in which he has been ordered to install a device to intercept oral communications by a court order which faithfully follows Title III and which includes a finding of probable cause, has he nevertheless intercepted conversations in a lawless manner as if he had no court order at all? Was there in fact "a neutral predetermination of the *scope* of [the] search"? *Katz* v. *United States,* 389 U.S. at 358. Or are entries to plant "bugs" themselves unconstitutional invasions of privacy *distinct from* the actual eavesdrop sanctioned in the order? An affirmative answer was "[e]ssential to [the] holding" in *United States* v. *Ford, supra,* 553 F.2d at 170, on *constitutional* grounds. I respectfully disagree.

Title III covers oral interceptions ("bugging") without prescribing any duties for the judicial branch on the method to be used in installing the "bug". These statutory requirements were carefully tailored to meet the constitutional requirements set out in *Berger* and *Katz. See United States* v. *Tortorello,* 480 F.2d 764, 771-75 (2d Cir. 1973). Congress knew that whether a "bug" was put in place by trespass or otherwise, the use of a "bug" to intercept conversations would require a warrant except when the "bug" is carried

by a participant in a face-to-face conversation, *On Lee* v. *United States,* 343 U.S. 747 (1952), or is used with the consent of a party. *See Katz, supra.* The warrant under Title III is limited to interception of oral conversations, 18 U.S.C. § 2518, and does not in any way permit the search and seizure of goods or papers on the premises. Indeed, if such goods or papers were subjected to search under the interception order, suppression would follow. There is an analogy to the opening of foreign mail by the Customs, which is not constitutionally offensive provided the letters themselves are not read. *See United States* v. *Ramsey,* —— U.S. ——, 45 U.S.L.W. 4577 (June 6, 1977).

What the statute requires is not a specification by the judge of the method for placing the "bug" but simply "a particular description of the place where the communication is to be intercepted". Congress knew that an order such as is under review, that "electronic *surveillance* of the oral communications of the above-named subjects *shall occur* at the above described premises" (emphasis added), would require covert installation. If supporting proof were needed, it is supplied by the 1970 Amendment, Pub. L. No. 91-358, Title II, § 211(b), 84 Stat. 654 (amending 18 U.S.C. § 2518(4)), under which the order authorizing interception of an oral communication may direct a landlord or custodian, among others, to furnish the applicant with all facilities and technical assistance necessary to "accomplish the interception *unobtrusively*" (emphasis added). This provision is not for the protection of the subject of the interception order since it is to be incorporated only "upon request of the applicant". In sum, if the enforcement agent thinks that he can achieve such cooperation on his own, he need not get a court order to execute his mission "unobtrusively" with the cooperation of the landlord or custodian.

With its attention having been called to the need for doing the job "unobtrusively" to the point of enlisting the aid of persons whose aid would amount to trespass, Congress failed to include in Title III a provision such as is found in the New York Criminal Procedure Law § 700.30 (8) which requires that an eavesdropping warrant contain "[a]n express authorization to make secret entry upon a private place or premises to install an eavesdropping device if such entry is necessary to execute the warrant",— a provision added to the otherwise almost verbatim copying of 18 U.S.C. § 2518(4). The judge to whom an application is made may, of course, require more than the statute prescribes before he is willing to sign the order, but the requirement that he separately sanction each surreptitious entry is nowhere to be found in the statutory scheme. That can hardly be due to to congressional oversight. It is implicit that ordinarily only a single entry need be made, save in the exigent circumstance of equipment malfunction, as was the case here. Because the statute does not require the judge to authorize the manner of entry, a contention that the judge is nevertheless required to do so must rest on a reading of the Fourth Amendment itself.

The Fourth Amendment in part reads: ". . . no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

The orders here do conform precisely to the requirements of the Fourth Amendment as well as those of § 2518. They particularly describe the *premises* to be "searched." They state that there is probable cause to believe that particular oral conversations of *named* persons and others concerning the *specified* offenses will be obtained through the interception at the *named* premises which, there is probable cause to believe, are being used for commission of the *named* offenses. "Prompt" execution of the authoriza-

tion is ordered, and the interception is limited not only in time but to occasions when at least one of the named subjects is present.

Since the right of the named persons to privacy has already been subjected to the "probable cause" test at the hands of an independent judicial officer and since the order is detailed enough to defeat any realistic claim that it is a "general warrant," I believe that the basic requirements of the Fourth Amendment have been met. I respectfully suggest that cases which have held trespass to be invalid in the absence of *any* warrant whatever are hardly dispositive. *But cf.* the discussion in *United States* v. *Ford, supra.* In *Berger* there was a surreptitious entry but the Supreme Court failed to note it as a *separate* constitutional problem. *See* 388 U.S. at 45, 53-64, 81-82, 96-97, 107-12. We do have here "the procedure of antecedent justification . . . that is central to the Fourth Amendment." *See Osborn* v. *United States,* 385 U.S. 323, 330 (1966).

Judge Smith notes that there may be a danger in surreptitious entry. That may be conceded, but the federal judge is hardly in as good a position to evaluate such risks as is the law enforcement agent. Common sense will suggest that, in the absence of a plausible ruse, the "bug" should be put in place when the premises are vacant. A mistake as to whether they are occupied, in fact, could hardly be corrected by a judicial order.

Now that attention has been called to this question in several circuits, it is hoped that Congress will provide the national consensus needed to reconcile the needs of law enforcement with the rights of privacy that belong to all persons until probable cause has been shown and the approval of an independent judge obtained. The finding of what the judge must do in these circumstances to keep the "search" reasonable is, I think, within the prerogatives of Congress. In the meantime, until the Supreme Court

speaks, it might be advisable for district judges to make a general direction for forcible or surreptitious entry a part of the interception order, not so much on constitutional grounds, *see United States* v. *Agrusa,* 541 F.2d 690, 696-98 (8th Cir. 1976),[1] as for the protection of the agents.

SMITH, *Circuit Judge* (dissenting):

I respectfully dissent. I would reverse for retrial as to all defendants, with all evidence obtained by electronic surveillance after warrantless surreptitious entries suppressed. The course followed by the agents here makes a mockery of the promise that the "dirty business" of electronic eavesdropping authorized by the Act of 1968, 18 U.S.C. §§ 2510-2520 (1970), would be strictly supervised and controlled. Title III of the 1968 Crime Control Act was drafted with the *Berger* and *Katz* decisions as a guide, including the *Katz* requirement to "conduct the search within precise limits established by a specific court order. . . ." 1968 U.S. Code Cong. & Ad. News 2162, 2163. It is not too much to ask that a magistrate pass upon the necessity for and the manner of surreptitious entries into private premises, either business or residential, in light of the obvious dangers of injury and death to occupants and officers in the course of such gross invasions of privacy. The dangers may vary greatly between such methods as the planting of a bug by a restaurant patron, and a forcible breaking and entry when the premises are assumed

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1 The Eighth Circuit said: "[W]hile there are two aspects to the search and seizure which occurred here [interception of oral communications after forcible entry] as compared with one in *Osborn* and *Katz*, this difference is, for constitutional purposes, one of degree rather than kind." 541 F.2d at 698. In *Agrusa*, though the order permitted "forcible entry at any time of day or night", it was challenged unsuccessfully on Fourth Amendment grounds.

to be unoccupied. The Congress recognized the existence of such devices as the martini olive transmitter, the spike mike, the infinity transmitter and the microphone disguised as a wristwatch, picture frame, cuff link, tie clip, fountain pen, stapler or cigarette pack. 1968 U.S. Code Cong. & Ad. News 2183. Electronic devices in some instances might be installed in a manner not requiring entry by the officers into the premises. See *United States* v. *Ford,* 553 F.2d 146, 151 n. 20 (D.C. Cir. 1977); cf. the "spike mike" of *Silverman* v. *United States,* 365 U.S. 505 (1961). Because of its dangers, "bugging" as distinguished from wiretapping, is relatively little used. See *United States* v. *Ford, supra,* 553 F.2d at 149, n. 12. The choice of methods should be made known to and passed on by the magistrate.

The lack of warrants for the entries is not the only defect in the procedures used here. The delays in sealing and lack of timely progress reports to the judges, as well as the unauthorized reentries indicate a wide disregard for the intent of the Congress that the use of this dangerous tool be strictly supervised. We have been willing to excuse an occasional slip-up on timing as my brothers have pointed out. The perhaps inevitable result has been a progressive weakening of the safeguards. I would agree with the District of Columbia Circuit in *Ford* and draw the line here.

ORDERS DENYING PETITION FOR REHEARING *EN BANC* DATED DECEMBER 15, 1977

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of December, one thousand nine hundred and seventy-seven.

Present:

HONORABLE MURRAY I. GURFEIN

HONORABLE LEONARD P. MOORE

HONORABLE J. JOSEPH SMITH

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

EUGENE SCAFIDI, a/k/a Bo and Luigi, BARIO MASCITTI, a/k/a Bari, ANTHONY DI MATTEO, a/k/a Apples, SAVERIO CARRARA, a/k/a Sammy Smash and Sammy, MICHAEL DeLUCA, a/k/a Mikey Junior, JAMES NAPOLI, JR. a/k/a Junior and Lefty, JAMES V. NAPOLI, SR. a/k/a Jimmy Nap, ROBERT VOULO, a/k/a the Kid, SABATO VIGORITO, a/k/a Sal,

Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants (J. Napoli, Sr., J. Napoli, Jr., S. Vigorito, E. Scafidi, M. DeLuca and R. Voulo)

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of December, one thousand nine hundred and seventy-seven.

UNITED STATES OF AMERICA,

Appellee,

v.

EUGENE SCAFIDI, a/k/a Bo and Luigi, BARIO MASCITTI, a/k/a Bari, ANTHONY DI MATTEO, a/k/a Apples, SAVERIO CARRARA, a/k/a Sammy Smash and Sammy, MICHAEL DeLUCA, a/k/a Mikey Junior, JAMES NAPOLI, JR., a/k/a Junior and Lefty, JAMES V. NAPOLI, SR., a/k/a Jimmy Nap, ROBERT VOULO, a/k/a the Kid, SABATO VIGORITO, a/k/a Sal,

Appellants.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the apppellants (James Napoli, Jr., James Napoli, Sr., Sabato Vigorito, Eugene Scafidi, Michael DeLuca and Robert Voulo), a poll of judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judges Mansfield and Oakes dissent in the denial.

s/ Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge

PORTION OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DEALING WITH SURREPTITIOUS ENTRIES DATED OCTOBER 14, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

FRANK ALTESE, et al.,

Defendants.

Portion of Decision of the United States District Court

75-CR-341

MISHLER, CH. J.

* * *

Surreptitious Entry Into Apartment 309 and the HiWay Lounge

On December 8, 1972, upon issuance of the 309 I order, agents of the Federal Bureau of Investigation surreptitiously entered the subject apartment with a passkey when defendants were absent and installed the authorized bugging devices. Although the order did not expressly provide for covert entry, the authorizing court well knew that bugging devices were to be employed rather than wiretaps. Similarly, the April 12, 1973 HiWay I order made no express mention as to the means to be employed by government agents in planting the intercept devices. But the court was not without knowledge that surreptitious entry was planned. Special Attorney Barlow testified that upon submitting the surveillance application to Judge Bartels, the Judge inquired as to how undetected installation was to be accomplished. Barlow told him of their plans to enter that night when no one was present and emplace listening devices in the premises' rear area. The defendants contend the facial defectiveness of the orders in that they fail to specifically authorize surreptitious entry to install surveillance devices mandates suppression.

Is express authorization to enter premises in order to emplace electronic bugging devices so as to effectuate the purpose of an intercept order necessary, or is such authorization implicit in the grant of the intercept order? Before turning to this inquiry, a determination must be made as to whether the defendants have standing to assert this challenge.

Portion of Decision of the United States District Court

Riddled with inconsistencies and pervaded by nuances, the question of standing to challenge Fourth Amendment violations has often been considered by federal courts. Yet a synthesis of the leading case on the issue, *Brown v. United States,* 411 U.S. 223, 229, 93 S.Ct. 1565, 1569 (1973), seems to indicate that standing devolves on a defendant only where he was present on the premises at the time the warrant was executed or where he has a proprietary or possessory interest in the quarters searched.

Apartment 309, to which the first series of orders pertained, was leased to a Phyllis Engert, a doctor's receptionist who spent her working day hours away from home. While away, the named subjects, DiMatteo, Mascetti, Mustaccio, Scafidi, and "other yet unknown" carried on their "banking" operations. That they supplied her with illicit payments only gave them a license to use the premises during the daytime; it did not give them a proprietary interest to challenge nighttime entry. Defendants' alternative contention is likewise without merit. They argue that the continuous nature of electronic surveillance resulting in the seizure of conversations when they were on the premises confers standing to challenge the installation of monitoring devices when they were absent. Two distinct aspects circumscribe any search and seizure question; the means used to gain access to the confines to be searched, and the subsequent seizure itself. *United States v. Agrusa,* Slip op. at 11 (8th Cir. July 6, 1973). Defendants' claim, however, only involves the first aspect. Since only Engert's rights were arguably invaded by the initial entry, the defendants cannot be heard to challenge its propriety. Hence the court finds defendants Moscitti, Mustaccio, DeMatteo and Scafidi are without standing to challenge the propriety of the FBI's entry to install devices at Apartment 309.

A different situation lies with respect to defendant Napoli, Sr. and his right to challenge the forced entry into the HiWay Lounge. At the suppression hearing had herein, Napoli, Sr.'s

sister, Mrs. Pascocello, testified as to the corporate structure behind the lounge's operations. After her husband's death she requested that Napoli, Sr. undertake the operations of the lounge and parent corporation Ampas Tavern, Inc. Mrs. Pascocello, however, remained corporate head and continued as the sole owner of the HiWay Lounge.

Though Napoli, Sr. used the HiWay Lounge solely for his gambling enterprise, he is not denied standing. His use of the premises for illegal purposes was with the knowledge and consent of the landlord, Mrs. Pascocello. Napoli, Sr. was the sole tenant in possession of the premises. The court finds therefore, that he has standing to challenge the admissibility of the tapes based on the government's surreptitious entry into the HiWay Lounge on the two occasions, *i.e.* prior to the interceptions pursuant to the April 12, 1973 HiWay I order and pursuant to Judge Judd's May 2nd, 1973 order. (See text, *infra* at 54-55).[12]

Title III is silent on whether agents may rightfully enter premises surreptitiously to install court ordered listening devices without express authorization. The legislative history is scant on the issue of congressional awareness of the possible necessity to employ covert tactics in implementing electronic surveillance. At best there exist only oblique references depicting an understanding of the problems surrounding installation and the shortcomings inherent in subsequent use when noise interference permeates the environment in which the bug is placed. *See* 114 Cong. Rec. 11958, 12989 (1968). This limited congressional direction is further compounded by a paucity of decisional law that deals only indirectly with the issue.[13]

In examining the safeguards that must be afforded, a significant distinction must be kept in mind. Twin aspects enshrine the process of electronic surveillance; the first is the

means employed in installing the monitoring devices while the second is the actual interception itself. *United States v. Agrusa, supra,* at 11. It is this latter aspect at which the thrust of Title III is directed. Detailed facts must be outlined sufficient to show probable cause in order to guard against the indiscriminate initiation of electronic surveillance. To assure that only pertinent conversations are seized, strict minimization requirements are imposed. Fabrication and alteration are supposedly prevented by the demands for judicial sealing of taped interceptions. In short, Congress devised a scheme whereby the judiciary was vested with supervisory control over law enforcement's investigatory methods. Their intention was to ensure that the free flow of conversations and the sanctity of a person's random thoughts would not be jeopardized by technological developments in surveillance techniques and the consequent potentiality for abuse.

The very breadth of the statutory authority vested in the court coupled with the serious nature of the intrusion involved casts an extraordinarily heavy burden on the authorizing judge in deciding whether or not an intercept order is to issue. Not only must he find that sufficient probable cause exists, but he must be satisfied that electronic surveillance is the only investigatory device that will prove successful. The very detailed nature of the requirements set forth in 18 U.S.C. § 2518 demands that the closest scrutiny be given applications for intercept authorization.

That consideration was given by Judge Bartels when the HiWay I order issued on April 12, 1973. Moreover, this court exhaustively reviewed the government's affidavit submitted in support of that order and confirmed that sufficient facts were recited to establish probable cause and to show a particularized need for electronic surveillance. As was pointed out earlier in this opinion, it was obvious that listening devices installed in the

rear area of the lounge were the only means left to the government by which to gather prosecutable evidence against the executives of the enterprise.

Moreover, Judge Bartels was not without knowledge as to what kind of devices were to be employed and how installation was to be effected. Special Attorney Barlow testified that in response to Judge Bartels' inquiry, he informed him of their plans to enter the lounge at night with a passkey in order to plant the bugging devices. The judge's question indicated his awareness of the inherent necessity to surreptitiously enter the premises to effectuate the court order.

It is the court's position that once probable cause is shown to support the issuance of a court order authorizing electronic surveillance thereby sanctioning the serious intrusion caused by interception, there is implicit in the court's order, concomitant authorization for agents to covertly enter the premises and install the necessary equipment. The circumstance underlying the issuance of an intercept order is analogous to the issuance of a traditional search warrant. Both the intercept order and the search warrant serve to sanction intrusions otherwise constitutionally prohibited. The privacy intrusion legitimized by the warrant is the entry into the private confines of the premises, the search and subsequent seizure of physical objects. The warrant itself serves to delimit the places to be searched and the items to be seized in keeping with the particularity requirements of the Fourth Amendment. *Coolidge v. New Hampshire,* 403 U.S. 443, 467, 91 S.Ct. 2022, 2038 (1971). The purpose to be served by the intercept order is to validate the intrusion resulting from penetrating the arena of confidentiality surrounding criminal conversation which monitoring enables, the interception of that secret conversation, and the subsequent recording. Entry to install bugging devices is but a mere condition precedent that must necessarily be satisfied if the

purpose behind an intercept order is to be effectuated. Entry to initiate surveillance is not another intrusion. Hence, there need not be express authorization in the intercept order that issues for that prerequisite. Judicial control over agents' activities, which is the underlying intent behind the entire wiretap scheme, is adequately accomplished by the limitations specified in the order, in satisfaction of Fourth Amendment requirements, as to the type of surveillance authorized, the location where surveillance is to be conducted, and the type of conversations that can be intercepted.

To order suppression when a court order issued solely because it does not expressly define the permissible methods of emplacement is to propound mere form over substance. This is not a case where government agents were given unrestrained discretion to choose whatever means they desired to effect installation. Hence the court's pronouncement in *United States v. Ford,* 414 F. Supp. 879 (D.D.C. 1976), is inapplicable to the case herein. (*See* N. 13). Sworn testimony was given by Special Attorney Barlow concerning his conversations with Judge Bartels as to the contemplated method of entry. A record existed of the court's implicit consent to nighttime entry by use of a passkey. Where as here surreptitious entry during late night hours was shown to be the only means by which to effectuate the purpose of the HiWay I intercept order, it would contravene all logic to suppress the evidence gathered. Accordingly, Napoli, Sr.'s motion to suppress on the grounds that installation of monitoring was surreptitiously accomplished is denied.

Judge Judd's May 2nd Order

Upon expiration of the HiWay I order on April 30, 1973, monitoring agents discovered that the batteries supporting the listening devices had failed. The government had advance knowledge that an important meeting was to be conducted on

May 3rd at the lounge. However, authorization from Washington for permission to apply for an extension order was not expected to arrive until May 3rd. The FBI's dilemma was obvious. If the HiWay II order would not issue until May 3rd, there would be no way to enter the premises to fix the lifeless devices before the impending meeting took place. Therefore, on May 2, 1973, Special Attorney Barlow appeared before Judge Judd seeking a warrant permitting nighttime entry into the lounge in order to correct the failure. Pursuant to Barlow's representations and the HiWay I order signed by Judge Bartels, Judge Judd issued an authorization accommodating the government's request.

Defendants argue the order was unlawful. They contend that Barlow's oral representations fell short of satisfying the requirements of 18 U.S.C. § 2518 (5) relating to the necessary contents of an application for an extension order. We disagree, however, with defendant's characterization of Judge Judd's May 2nd authorization as an extension order. It did not permit continued surveillance. The order simply authorized entry, seizure, and reparation of the malfunctioning devices. As such it is more properly characterized as a search warrant and the full set of requirements as detailed in 18 U.S.C. § 2518(3) need not be satisfied. Only probable cause need be found to justify its issuance. More than ample probable cause existed. Hence, the order lawfully issued.[14]

Conclusion

For all the reasons heretofore cited, defendants' motion to suppress is denied in all respects, and it is

SO ORDERED.

s/ Jacob Mishler
U.S.D.J.

FOOTNOTES

* * *

12 The court finds that no other defendant, specifically James Napoli, Jr., had an interest in the premises sufficient to confer standing.

13 This court in its research found two reported decisions that dealt with the issue of surreptitious entry by government agents to install court authorized listening devices: *United States v. Agrusa,* Slip op. (8th Cir., July 6, 1976), and *United States v. Ford,* 414 F. Supp. 879 (D. D.C. 1976).

In *Agrusa,* the government agents investigating the defendant for the theft, possession, and sale of property stolen from interstate commerce, in violation of 18 U.S.C. §§ 659, 2315, and 371, secured a court order authorizing electronic surveillance for a period of 20 days at defendant's place of business. The order specifically authorized the government "to make secret and, if necessary, forcible entry any time of day or night . . . upon the premises . . . in order to install and subsequently remove whatever electronic equipment is necessary to conduct the interception of oral communications in the business office of said premises." Pursuant to this order, government agents forcibly entered the defendant's body shop after regular business hours and planted a listening device. On appeal, the defendant argued the district court could not validly issue such authorization consistent with the Fourth Amendment and other applicable law.

The Eighth Circuit found both constitutional and

statutory support to reject Agrusa's contention; they held the government's forcible entry proper when executed pursuant to express authorization contained in the intercept order. The court, however, specifically noted that they were not rendering a decision on the propriety of the government's actions when taken without express authorization. *Id.* at 11, n. 13.

A similar question as to the propriety of covert actions by government agents was treated in *United States v. Ford, supra.* Therein, a twenty day intercept order provided:

> (d) Members of the Metropolitan Police Department are hereby authorized to enter and re-enter the [premises] for the purpose of installing, maintaining and removing electronic eavesdropping devices. Entry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry, or entry and re-entry by ruse or strategem.

The bugs were installed by a team of officers posing as members of the bomb squad during a bomb scare ruse used to evacuate the premises. The following day, it was discovered that the eavesdropping devices were not working. Police re-entered the same way and the malfunctioning devices were replaced. Representations were made to the reviewing court that judicial approval had been secured for the second entry. This authorization, however, was never transcribed.

The court recognized the inherent necessity to employ

covert tactics in effectuating the intercept order, and the consequent power of the issuing court to authorize surreptitious activity. *Id.* at 882-83. The court, however found the above noted authorization overbroad in that it vested police with unrestrained discretion as to the means to be employed in installing the court ordered listening devices. The court indicated though, that the facial overbreadth of the provision might have been avoided if court authorization for each entry was recorded. The representations of the government attorney as to his conversations with the authorizing judge, concerning the means to be employed in entering the premises on each occasion, were never presented by affidavit nor sworn to under testimony.

14 We submit, however, that if an extension order had issued prior to the government's re-entry and restoration efforts, express concomitant authorization to re-enter would not have to have been included in the continuation order. If a court is apprised of the need to re-enter to fix failing devices at the same time it is considering the application for the extension order, and the order in fact issues, there is inherent authorization for government agents to reenter and repair spent equipment if entry is shown to be the only way by which reparation can be accomplished. (*See* text, *supra* at 52-54).

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